Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–261 OF 1995
ABDULL HAMID EMBONG J
20 JUNE 2000

***Contract** — Intention to create legal relations — Memorandum of understanding — Entered into between plaintiff and chairman of building sub-committee of non-profit organization — Chairman not authorized to singularly bind organization — Whether organization bound by MOU — Whether MOU subject to organization's memorandum and articles of association*

The defendant was a non-profit organization incorporated under the Companies Ordinance 1924 as a company limited by guarantee. The defendant was allowed by its memorandum and articles of association (M & A) to raise funds to promote its objects, subject to the approval of a two-third majority of the defendant's general meeting and the consent of the court. The president of the defendant for the period 1983 to 1994 (except for 1988) was one SM, who was also the chairman of the management committee (MC) which managed the defendant. The MC was empowered to establish sub-committees which were subservient to the MC and which could not make decisions binding on the defendant. One such sub-committee was the Building Sub-Committee (BSC). The position of chairman of the BSC was traditionally held by the president. The plaintiff had dealt with SM as the chairman of the BSC and had entered into a Memorandum of Understanding (MOU) to develop land belonging to the defendant. The MOU was discussed at the defendant's EGM in January 1993, although there was no approval by way of resolution. An EGM held in May 1993 discussed the need to amend its M & A but instead resolved to waive the requirement of the court's consent. In 1994, one VM was elected President of the defendant. VM did not recognize the MOU as being binding on the defendant. The plaintiff sued for a declaration that the MOU was binding and to restrain the defendant from breaching it.

Held, dismissing the application:

(1) The MOU was subject to: (i) obtaining the consent of the general body of the defendant; (ii) obtaining the consent of the High Court; (iii) a final agreement to be entered into; and (iv) amendments to be made by the defendant to the building plans (see p 86G–I).

(2) What was ratified at the EGM of January 1993 was the acceptance in principle of the plaintiff's proposals. However it was clearly envisaged that a final agreement needed to be entered into (see p 87A–C).

(3) The defendant being a charitable body, public interest required that the consent of the High Court be obtained as required by its M & A. The defendant, even through a resolution of its members, could not circumvent this requirement (see p 87C–D).

(4) SM, in his role as president of the defendant and chairman of the BSC, was merely authorized to negotiate for the defendant but not authorized to singularly bind it (see p 88D–E).

(5) It was clear that the plaintiff had trusted that SM would see the whole project through and in the end would sign up a joint-venture agreement. It was a risk that the plaintiff undertook (see p 89G–I).

(6) The MOU was a simple document of understanding, a starting point for the parties to negotiate and to agree on the intricate details of how the building should finally be built. On its own it was too uncertain to be enforced (see pp 90I–91B).

[Bahasa Malaysia summary

Defendan merupakan satu pertubuhan tanpa untung (non-profit organization) yang diperbadankan di bawah Ordinan Syarikat 1924 sebagai sebuah syarikat yang terhad oleh jaminan. Defendan dibenarkan oleh memorandum dan perkara-perkaranya (M & P) untuk mengumpul dana untuk mencapai tujuan-tujuannya, tertakluk kepada kelulusan majoriti dua pertiga mesyuarat am defendan dan kebenaran mahkamah. Presiden defendan untuk tempoh 1983 hingga 1994 (kecuali tahun 1988) adalah seorang bernama SM, yang juga pengerusi jawatankuasa pengurusan (JP) yang menguruskan defendan. JP berkuasa untuk mewujudkan jawatankuasa kecil yang tertakluk kepada JP dan tidak boleh membuat keputusan yang mengikat defendan. Satu jawatankuasa kecil demikian adalah Jawatankuasa Kecil Bangunan (JKB). Jawatan pengerusi JKB lazimnya dipegang oleh presiden. Plaintif telah berurus dengan SM sebagai pengerusi JKB dan telah memasuki satu Memorandum Persefahaman (MP) untuk memajukan tanah kepunyaan defendan. MP telah dibincangkan di mesyuarat luar biasa (MLB) defendan pada bulan Januari 1993, walaupun tiada kelulusan melalui resolusi. Suatu MLB yang diadakan pada bulan Mei 1993 membincangkan keperluan untuk meminda M & P tetapi sebaliknya memutuskan untuk mengenepikan keperluan untuk kebenaran mahkamah. Pada tahun 1994, seorang bernama VM dilantik sebagai presiden defendan. VM tidak mengiktiraf MP sebagai mengikat defendan. Plaintif mendakwa untuk satu perisytiharan bahawa MP adalah mengikat dan untuk menahan defendan daripada melanggarnya.

Diputuskan, menolak permohonan tersebut:

(1) MP adalah tertakluk kepada: (i) pemerolehan kebenaran dari badan am defendan; (ii) pemerolehan kebenaran Mahkamah

Tinggi; (iii) perjanjian muktamad untuk diikat; dan (iv) pindaan hendaklah dibuat kepada pelan bangunan oleh defendan (lihat ms 86G–I). A

(2) Apa yang dibenarkan (ratified) di MLB pada bulan Januari 1993 adalah penerimaan cadangan plaintif dari segi prinsip. Walau bagaimanapun, jelas dibayangkan bahawa satu perjanjian muktamad perlu diikat (lihat ms 87A–C). B

(3) Defendan sebagai satu perbadanan kebajikan, kepentingan awam menghendaki bahawa izin Mahkamah Tinggi diperolehi seperti yang dikehendaki oleh M & P. Defendan, walaupun menerusi satu resolusi ahli-ahlinya, tidak boleh memintasi keperluan ini (lihat ms 87C–D). C

(4) SM, dalam peranannya sebagai presiden defendan dan pengerusi JKB, cuma diberikuasa untuk berunding bagi pihak defendan tetapi tidak diberikuasa untuk meingikatnya secara tunggal (lihat ms 88D–E).

(5) Adalah jelas bahawa plaintif telah mempercayai bahawa SM akan menyeliakan projek sehingga penyelesaian dan akhirnya akan menandatangani perjanjian urusan bersama. Ia merupakan satu risiko yang diambil oleh plaintif (lihat ms 89G–I). D

(6) MP adalah satu dokumen persefahaman, satu titik permulaan untuk pihak-pihak berunding dan atas butir-butir mengenai cara bangunan harus dibina. Secara sendiri ianya amat ragu-ragu untuk dikuatkuasakan (loihat ms 90I–91B).] E

Notes

For cases on intention to create legal relations, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3193–3196. F

Cases referred to

Abdul Malik bin Abdul Majid v Asnah bte Hamid & Anor and Dagang bin Bachik v Abdul Malik bin Abdul Majid [1985] 2 MLJ 459 (refd)

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action [1996] 3 MLJ 385 (refd) G

Ayer Hitam Tin Dredging & Regalian Properties v London Dockland Devp Corp [1995] 1 All ER 1005 (refd)

Ayer Hitam Tin Dredging (M) Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd) H

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108 (refd)

Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor [1974] 2 MLJ 83 (refd)

Lim Guan Eng v PP [1998] 3 MLJ 14 (refd) I

M Ratnavale v S Lourdenadin and M Mahadevan v S Lourdenadin [1988] 2 MLJ 371 (refd)

Michael v Soon Teck Finance Co & Anor [1962] MLJ 53 (refd)
New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd [1996] 4 CLJ 94 (refd)
Public Bank Bhd v Metro Construction Sdn Bhd [1991] 3 MLJ 56 (refd)

Legislation referred to

Specific Relief Act 1950 s 20(1)(c)

Anad Krishnan (*Renu Zechariah* with him) (*Anad & Noraini*) for the plaintiff.

R Rajasingam (*Shanmugam, Joseph Yeo* and *RR Sethu*) (*R Rajasingam & Co*) for the defendant.

Abdull Hamid Embong J: The plaintiff in this suit sought the following reliefs:

(1) a declaration that the memorandum of understanding (MOU/P28) dated 12 December 1992 entered into between the parties is a valid and binding contract;

(2) specific performance by the defendant of the MOU;

(3) an injunction restraining the defendant or its agents from taking any steps to call in new tenders for the development of the defendant's subject land described as Lot 166, Section 1, Georgetown ('the said land').

(4) an injunction restraining the defendant developing or awarding any contract for the development of the said land;

(5) if an award to develop the said land had been given to another party, an injunction to stop the defendant from taking any further step in the development of the said land;

(6) damages in breach of contract; and

(7) costs and any further reliefs.

Facts

The defendant, the Indian Association Penang ('the IA') is a non-profit organization incorporated on 23 April 1924 under the Companies Ordinance 1924, as a company limited by guarantee. As can be seen from its memorandum of association (M & A; exh P152) the IA's objects are wide and multifarious although in the main, it can be discerned as a social club for members of Indian descent (see its articles at P152) and to provide for its members a clubhouse with the usual club facilities in games and sports, entertainment and dining. The IA is also allowed by its M & A to raise funds in order to promote its objects, and may create debentures charges or leases towards this end.

However, in doing so, its memorandum requires the approval of a $^{2}/_{3}$ majority attending its general meeting plus the consent of court. This can be seen from the peremptory and emphatic language of cl 32 of its memorandum which states:

> To do all such things as are incidental or conducive to the attainment of the above objects provided that in case the association shall possess or acquire any immovable properties or real estate, the association shall not sell, lease, transfer or divest such property without the prior approval of $^2/_3$ of the paid up members present at a general meeting and in addition subject to the consent of the court.

The requirement of the court's consent is an added safeguard in the disposal of the IA's immovable property or its real estate in view of the charitable objects also stated in its memorandum (see eg cll 8 and 9) and the fact that the IA is more of a social club, although incorporated as a company.

The IA, at all times, was managed by a management committee ('the MC') whose members are elected at the IA's annual general meetings (AGMs). The MC is akin to a company's board of directors, whose main function is the running of the IA. It is headed by a chairman chosen from amongst its elected members. Up to 7 July 1994 En Samuel J Devagnaman, also known as Sam Mathuram (SP4) who was then the president of the IA, held the chairman's post until he was succeeded by Mr V Mohan (SD1) who was elected as the IA's president at the AGM held on 26 June 1994. SP4 had been president from 1983 till 1994, except for the year 1988. The MC was empowered to establish sub-committees pursuant to art 24 of its M & A. These sub-committees were responsible and answerable to the MC. Essentially the sub-committees function to assist the MC in its various functions. The sub-committees were not, however, independent of the MC and could not make any decisions binding on the IA. They were, in all respects, subservient to the MC. One of the sub-committees created by the MC was one known as the Building Sub-Committee ('BSC'), which was formed with the sole purpose of looking into the IA's building project. The IA had been planning to build its own clubhouse for some years, even before SP4 became its president. The president also held the position of chairman of the BSC, following a long-standing practice, though not provided for in the M & A. Thus, during his tenure as president of the IA, SP4 also held that post. In 1991, a first attempt was made to solicit offers to develop the IA's land. Several offers were received by the IA and ultimately the MC recommended one offer, from a company called Sobena, to its members. That offer was, however, rejected by the IA's extraordinary general meeting (EGM) held on 12 April 1992 since Sobena was found to be financially unsound. The MC then decided to make a second try. An advertisement on the development project was advertised in the national newspapers on 2 June 1992 (P8). According to SD1, the IA records showed that 28 offers were received and after a shortlisting process, through questionnaires sent out to the respondents, the IA received four proposals it considered concrete. One was from the plaintiff company, Kheam Huat Holdings Sdn Bhd ('KH'). The chairman and managing director of KH is Mr Lee Cheow Kheam (SP1). KH took over the proposal initially made by another company, Tri-Den Construction Sdn Bhd ('TC') (see P12 and P13). SP1 was also a director of TC then. SP1 was also the managing director of another company called Paradise Properties Sdn Bhd ('PP'), at the relevant

A period. In November 1992, KH responded to the questionnaire by answering all the questions set out therein (see P22) essentially outlining a skeletal proposal on the building project that KH was willing to undertake. According to SP4 the purpose of sending out the questionnaire was to determine the common grounds that could be agreed between the IA and the respondents as negotiating points. After receiving KH's proposals, SP4 B drew up a document which he termed as a 'tentative agreement' (memorandum of intent) which was discussed at the MC meeting on 2 December 1992. By then, there were only two contenders left to undertake the building project, ie KH and a company called Kwan Joo Development Sdn Bhd.

C After various changes were made to the tentative agreement by SP4 after consulting with another member of the BSC, ie Mr Murugappan (SP5), a memorandum of understanding (ie the MOU) was drawn up. Both KH and Kwan Joo Development Sdn Bhd were asked to sign the MOU. KH executed it and also paid a deposit of RM30,000 whilst Kwan Joo was not asked to do the same, putting it out of contention. According to SP4, D KH's proposals and terms as embodied in the MOU were discussed at the IA's EGM on 3 January 1993 (see P153), although there was, in the court's finding, no approval by way of a resolution. It is necessary now to produce the MOU In full since this document is the crux of the Issue at hand.

MEMORANDUM OF UNDERSTANDING

E A memorandum of understanding entered into this day of 12 December 1992.

Between

The Indian Association, Penang, a company limited by guarantee and incorporated in Malaysia having its registered office at No 11, Bagan Jermal Road, 10250 Pulau Pinang ('the association') of the one part

F And

Kheam Huat Holdings Sdn Bhd, a company incorporated in Malaysia having its registered office at No 42, Dato Koyah Road, 10050 Penang ('the company') of the other part.

1 Wheras negotiations to develop land measuring approximately 4.6 acres belonging to the Indian Association and comprised in Lot 166, Section 1, G Georgetown, NED Penang ('the said land') has been held on 20 November 1992 between the parties herein.

2 And whereas the association has decided to develop the said land by selling part of it with the prior approval of the general body at an EGM together with the consent of the High Court on terms mentioned herein ('the said proposal').

H 3 And whereas it is the intention of the parties herein to enter into this memorandum of understanding subject to:

  1 Obtaining the consent of the general body to the said proposal.

  2 Thereafter the consent of the High Court.

  3 A final agreement being concluded between the parties after their I lawyers have studied and advised on the matter.

  4 To any amendments that may be made by the association to the Building plans submitted by the said company.

4 And whereas the association shall be entitled to 2.1 acres on the Phor Tay School end of the said land ('the association land') and the company shall be entitled to 2.5 acres nearer to the Jermal Flats end of the said land ('the company's land').

5 And whereas the said company has represented that they shall be building for the benefit of the association:

   1 A clubhouse, school and hostel and circulation area, the built up area of which shall not be less than 70,000 sq ft ('the clubhouse area').

   2 A sub-basement car park and circulation area of not less than 33,000 sq ft ('the car park').

   3 External and landscaping areas of not less than 69,726 sq ft.

6 And whereas the company has represented that for the purposes of determining the cost of the Indian Association building as mentioned in para 2(b) here below it shall be determined jointly by the quantity surveyors of both the association and the said company.

7 And whereas the said company intends to apply to the appropriate authority to have mixed development of both residential and commercial purposes.

8 And whereas the said company intends to follow the normal practice when applying for sub-divisions of the association land and the company's land.

9 And whereas the said company has represented to the association that the final building plans will have provisions for an additional two floors in selected areas.

10 And whereas the said company has represented that it purchased associate membership for apartment purchasers in the association at an entrance fee of RM5,000,00 for each apartment purchaser.

11 And whereas the said company has represented that it will construct a scale model of the association's new building at its own cost and exhibit it in the Indian Association upon the building plans being approved, on condition that the said company is awarded the project.

12 And whereas the company shall be applying for bumiputera status when developing the company's land. However if the company cannot find a bumiputera as a shareholder, the company shall undertake the project on its own.

13 And whereas the company represents that it will comply with the rules and regulations of the local authorities and estimates that time for approval of building plans may take about between 14 and 18 months.

14 And whereas the company represents that the estimated time for the completion of the association's new building is 36 months from approval of building plans from delivery of vacant possession.

15 And whereas the company presents that it will provide not less than 130 car parking bays for the association.

Now this agreement witnesseth as follows:

1 That in consideration of the said company constructing a clubhouse, school, hotel and such other ancillary facilities in accordance with plans approved by the association and the local authorities on the association's land, the association agrees to transfer the said company's land to the said

company provided that the following terms and conditions are complied with by the company prior to the transfer of the said company's land and upon full compliance by the said company of all the covenants herein contained.

2(a) The said company undertakes to construct a clubhouse, school, hostel and such other ancillary facilities with a total value of not less than RM6,273,016m such value being determined by reference to cost of construction as certified by the association's quantity surveyor and the company's quantity surveyor. In the event the cost of the Building upon construction shall be determined to be less than RM6,273,016m either due to reduction in the size of the building or quality of finishes, or due to reduction in construction costs then the said company shall pay the difference between the actual cost and the RM6,273,016m mentioned above to the association in cash.

(b) In addition to the RM6,273.016m mentioned above the company shall also pay to the association a cash contribution of RM2m.

(c) Further in the event the said company succeeds in obtaining approval for any commercial facility on the company's land the said company shall make a further cash contribution of RM1m.

3 The company shall be entitled to a transfer to the company's land if the said company shall have fully complied with all conditions precedent and provided that the company shall affect registration of the transfer simultaneously with registration of a charge in favour of any financial institution and that all monies raised from such charge shall be placed to the credit of a separate banking account in the name of the association provided further that if there is any shortfall between the consideration payable to the association under the terms of the proposal herein and the loan monies then the difference shall become immediately payable by the company to the credit of the above-mentioned account.

The monies in the said banking account shall only be released to the company from time to time based on their progress of work with respect to the association's building proposals as certified by the association's architect.

In the event that the company does not proceed with the agreed schedule of works or completely stops building for a period of three (3) months then the association shall be entitled to terminate the arrangements to the company and upon such termination all monies standing to the credit of the said Banking Account shall belong to the association absolutely.

Furthermore, although monies may be periodically paid out as envisaged above, any interest earned on this account shall belong to the association.

4 The company also hereby agrees to pay a tender deposit of RM30,000 before 12 December 1992 and upon being notified of the date of the EGM by the association which said sum shall be put in fixed deposit by the association immediately.

If the company's proposal is selected by the members at the EGM,, the association shall retain such amount which shall be taken into account of the sum referred to in para 5 here below.

However if the company's proposal is not selected the association shall refund the said sum of RM30,000.00 together with any interest earned.

Furthermore, if the company's proposals are accepted by the General body and if at any time before entering into a final agreement as envisaged in the preamble hereto, the company changes its mind to proceed with the proposals the said sum of RM30,000.00 together with all interest earned shall be forfeited.

5 When the final agreement is entered into as envisaged in the preamble abovesaid the company agrees to pay RM500,000 as a performance bond/earnest money:

(a) which shall be taken into account of the RM6,273,016m mentioned in para 2(a) above and shall be used to meet payments such as fees for architectural, sewage, engineering, sub-division and other rates save and except consultancy fees.

(b) In the event that the application for change of use of part of the association's land and/or the layout of the building plans submitted with the approval of the association are rejected then the company shall be entitled to a refund of the earnest money free of interest.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

SIGNED BY the said Lee Cheow Kheam) tt
in the presence of) Managing Director
) KHEAM HUAT HLDGS
) BHD
tt)
(YUN JOO MUN))
)
Signed by the said) tt
in the presence of)

It can be immediately seen from para 3 of the preamble that the MOU contemplates the requirement of an approval of the IA's general body (vide its general meeting) and consent of the court, as is provided by cl 32 of its memorandum, referred to earlier. Clause 5 of the MOU further contemplates that a final agreement shall be entered into by both parties upon which event KH agreed to pay as earnest money a sum of RM500,000. It was for the earlier mentioned constraint in its M & A that the IA at its AGM on 30 May 1993 (see P153) discussed the need to amend its M & A but decided against it. Instead, it was resolved that the general body waived the requirement of the court's consent. Under cross examination had stated that the M & A did not provide for a waiver of the requirement of consent of court when disposing of the IA's land. SP4 also agreed that the MC had full control over the IA's property subject to its by-laws. In his evidence, SP4 stated his view that the MOU became a binding agreement after the general body accepted KH's proposals at its EGM — 3 January 1993. SP4 was also of the view that the RM30,000 deposited by KH was forfeitable if KH failed to undertake its obligations under the MOU. SP4 also stated that it was envisaged that after the execution of the MOU the parties would enter into a final agreement after the lawyers of

A both parties had studied the terms in detail (see preamble 3 of P28). It was also envisaged that the final agreement would also be executed to include the necessary details such as the completed building plan and sub-division plan and also the mechanics of the transfer of the IA land. These details would entail some changes to the terms of the MOU.

B After SP4 signed the MOU on behalf of the defendant, there were exchanges of draft agreements between the parties' solicitors. The plaintiff was represented by lawyer Stella Soo (SD2) and the defendant by the firm of Presgrave and Matthews (P & M). Stella Soo prepared a first draft (P38) which contained various blanks on matters still under negotiation. Two other drafts were prepared, ie P40 and P45, the latter forwarded to the C Defendant's solicitor was described as a draft which, in my view, suggested that no concluded agreement had been agreed to. This is supported by the response of P & M to those drafts. P & M were not happy with Stella Soo's draft and decided to produce its own (P148) which was completely different from the plaintiff's draft. On 7 April 1994, Stella Soo wrote a letter to the defendant (P84) stating that the agreement was aborted by the plaintiff. D SP1 in his evidence stated that the plaintiff had not intended to abort the agreement but that he merely wanted to change solicitors but had lied to Stella Soo about it since Stella Soo's husband was then an engineer with one of the approving authorities (ie Majlis Perbandaran Pulau Pinang) and could cause the plaintiff problems if he had found out that his wife had been E discharged from acting as the plaintiff's solicitor. SP1 said that he had explained the situation to SP4 who accepted it and had, after that, continued dealing with the plaintiff in spite of the abortment letter vide p 84. The plaintiff, not surprisingly, chose not to call Stella Soo as a witness to explain P84. Stella Soo was instead called by the defence (as SD2), and despite objections from the defence which the court overruled, she F confirmed that she had received instruction from the plaintiff on her discharge and the abortment and after due settlement of her fees, she wrote P84 to inform the defendant. There was no suggestion put to SD2 during cross examination that P84 was actually intended for a change of solicitor, and not an abortment of undertaking the building project by the plaintiff. In the face of this contradictory evidence, I came to the conclusion that G SP1's explanation on the abortment letter had been substantially mitigated and damaged, and as such he had failed, on a balance of probabilities, to discharge the burden of proof on this issue. I agree with the defence, in submission, when it was said that in the absence of any challenge the plaintiff was bound by what his previous solicitor had testified about the abortment. P84 was also never presented to the BSC, according to SD3.

H SP1 also explained that he had wanted to retain the services of a more senior solicitor. Thus, after terminating Stella Soo, the firm of GB Neoh Ng & Anuar was employed by the plaintiff. The new solicitor wrote to the defendant stating that they were acting for PP (Paradise Properties SB) and there was no mention that they had taken over the matter from Stella Soo. I Nor had the plaintiff, before that, written to the defendant or P & M informing them formally about the change of solicitor. In the circumstances this court found that, even if the MOU was binding upon the parties.

In view of the evidence, both documentary and SD2's testimony, the plaintiff had aborted it pursuant to P84.

PP's first letter (P88) was substantially a new offer and no reference was made to the MOU. The emergence of PP onto the scene was not made known to the members of the IA or to the MC. Even the BSC was unaware of PP's existence then as it was never discussed at its meetings (see the testimony of SD3, Mr Albert Varghese, a member of the BSC at the relevant period). It was discovered at the AGM of 26 June 1994 and the IA's members took objection to PP's participation in the project. Although PP and the plaintiff shared in SP1 a common director, the court agreed with the stand of the defence that they had to be looked at as separate legal entities since the initial offer by the defendant was to a different company, ie the plaintiff. SP4 himself foresaw the problem when he advised SP1 to use KH's (plaintiff) letterheads in future correspondence. SP4 was, of course, aware of PP's existence as he was, almost singlehandedly involved in negotiating with SP1 all along, and SP1 had been in constant touch with SP4 personally on the building project. On 14 September 1994 the BSC had a meeting (see P184) purportedly to finalize the terms of the agreement. Having scrutinized the minutes of the meeting (p 184) it is my finding that no binding agreement had yet been concluded up to that point. I agree with the defence stand that there were markedly many departures in the second draft agreement discussed at that meeting from the MOU which were not approved either by the MC or the IA's general meeting. Further, the advice on the draft discussed was not sought from P & M, as was required. I also accept SD3's evidence stating that the building plans, scope of works and specifications were not annexed to the draft. SD3 was a consultant quantity surveyor of 48 years' experience and was invited to sit on the BSC and entrusted with the matter of costs and quantities of the building project. It was also suggested at the BSC meeting that the draft agreement had changed some terms of the MOU and was more favourable to the IA and thus should be accepted. The BSC at that 14 September 1994 meeting accepted the second draft agreement. The question for determination is whether the BSC could decide for the MC and bind the IA.

Management hierarchy of the IA

As stated earlier, the IA was managed by the MC which was responsible for its daily management affairs. The MC had created various sub-committees to assist it in managing the IA, one of which was the BSC. All the sub-committees were responsible to and answerable to the MC, which in turn had to answer to the members in the general meetings. The BSC was made a permanent sub-committee in May 1993. The change of name for the BSC (into a permanent BSC) did not, in my view, change its status as being merely one of the sub-committee answerable to the MC. The BSC still remained a sub-committees without any power, under the memorandum and articles, to make any binding decisions for the IA. It was made 'permanent' to remain in existence to pursue the building project for the IA, which was then, and still is, the most important project undertaken by the IA. It was agreed by the members that the permanent BSC should exist in the same form to monitor and continue the efforts undertaken by its predecessor in respect of the building project. Thus, I find that the permanent BSC could not operate independently of the MC to make any decision binding on the IA. It had no such authority.

When SD1, Mr V Mohan, took over as president of the IA on 7 July 1994, after his election into the MC of the AGM on 26 June 1994 he received reports and documents from the BSC. Mr Sam Mathuram (SP4), who was also elected to the MC, resigned from the MC immediately after Mr Mohan's appointment as president. SP4, however, remained as the chairman of the BSC, a post he had held throughout the tenancy of his (SP4) presidency of the IA. SP4 had invited SD1 and the MC members to the BSC meeting on 14 September 1994 but SD1 was unable to attend as he was away then. Of the documents received by SD1, one was a new proposal from a new party, ie Penas to undertake the IA building project. SD1 also received P88, ie the offer from PP, which to him was a completely new proposal from the one made by the plaintiff. SD1 said that he first came to know of PP at the AOM held on 26 June 1994 when a letter from GB Neoh Ng & Anuar (plaintiff's solicitor) to P & M (defendant's solicitor) was disclosed stating that PP had deposited with GB Neoh Ng & Anuar a sum of RM470,000 on 2 June 1994 purportedly as balance of the 10% deposit required to be paid by the plaintiff under the MOU. SP1 had explained to SP4 that PP was introduced into the project to reflect bumiputera participation in the plaintiff company. The balance deposit sum of RM470,000 was returned to the plaintiff after the IA held an AGM on 7 May 1995. Faced with these two new proposals, SD1 reverted them to the BSC and asked the latter to make its comments and recommendations on both proposals and submit a report. After a few reminders the BSC submitted its report (P169) but failed to make any recommendations. The defendant on 30 December 1994 wrote to the BSC and requested for its recommendations which were not included in P169. It also sought the BSC's comments on the proposal made by Penas. On 10 January 1995, SP4 responded (see D181) and asked the defendant to obtain a fresh offer from Penas. SP4 also asked the MC to look into the legal implications of not proceeding with the MOU executed with the plaintiff.

Before considering this central issue, a bit more of the factual background needs to be narrated. After SD1 took over the IA's presidency. It became obvious that he was not such a willing player as SP4 was to recognize the MOU as being binding on the defendant. SD1's objection to the introduction of a new company (ie PP) into the project had been expressed at the AGM held on 26 June 1994 (see minutes of AGM in P155). At that general meeting a resolution was passed that an EGM be held to discuss the joint venture agreement ('JVA') to obtain the views of the members before the JVA was executed. (See testimony of SP3, the IA's secretary). The EGM was subsequently held on 7 May 1995 (see P155) by which time SD1 was firmly in control of the MC. There was obvious disagreement between SD1 and SP4 over the latter's handling of the building project. It came as no surprise therefore that SP4 resigned from the MC when SD1 was elected as chairman of the MC on 7 July 1994. By that time, to recall, SD1 considered that the MOU was spent since there were then two new offers by PP and Penas and the second draft agreement forwarded by the plaintiff had also departed from the terms initially agreed by the parties in the MOU. The MC had also, on 26 January 1995, directed the BSC not to have any further negotiations with SP1 without the approval of the general body (see P177(13) and a letter was also sent to SP4 to discontinue dealing with SP1). Also, the defendant had by then received a letter of abortment from Stella Soo, the plaintiff's solicitor. Against that background the defendant at its EGM on 7 May 1995 passed a resolution that the MOU was not binding and not enforceable on it.

Whether the MOU (P28) was a binding agreement

It was not in dispute that there were ongoing negotiations and dealings between the plaintiff and the BSC up to the point the defendant passed its resolution to declare that the MOU was not binding or enforceable. The plaintiff had mainly dealt with SP4, chairman of the BSC and at one time president of the IA and SP5, Mr Muruggapan, to negotiate on the terms of the agreement. Other members of the BSC were appointed to deal in specific areas. So, for example, SD3 (Albert Varghese) was appointed to deal with the plaintiff on the bill of quantities, and Mr Derrick David, an architect was entrusted to deal with the building plans and liaise with the plaintiff's architect. Learned counsel for the plaintiff had submitted that the BSC (including later, the permanent BSC) was an organ of the defendant and that the plaintiff, through SP1, had dealt with various members of the BSC on the basis that they had authority to deal and that SP1 at no point was informed that the BSC had no powers to deal with him. True, but as earlier held, that did not make its decision binding on the defendant.

It was also submitted that when SD1 took over as president, he and a few others notably SD3 had gone all out to declare the MOU as null and void and scuttle it. It was also submitted that the parties had intended to enter into a binding agreement, looking at the events and conduct of the parties both pre and post the MOU. Learned counsel further submitted that so far as the plaintiff, SP4 and SP5 were concerned, the MOU became a binding agreement on 3 January 1993 when it was ratified by the defendant at its EGM, doing away with the necessity of obtaining the court's consent. It will be necessary to recall the conditions in preamble 3 of the MOU, where it was made subject to:

(i) obtaining the consent of the general body to the said proposal;

(ii) obtaining the consent of the High Court;

(iii) a final agreement be entered into after the parties' lawyers had studied and advised on the matter; and

(iv) that amendments may be made by the IA to the building plans submitted by the plaintiff.

At the EGM of 3 January 1993 (see its minutes at P154) the members were informed that there would be further negotiations for the final agreement to

A be drawn up. Negotiations were in fact held on various occasions before the draft agreements were produced. The plaintiff's two draft agreements were themselves subject to negotiations and acceptance. In my view what was ratified at the EGM on 3 January 1993 was for the acceptance in principle of the proposal put up by the plaintiff. In other words, the IA members were agreeable to have the building project proceeded with on a joint venture B basis with the plaintiff. It cannot be said that the MOU had become binding at that point. It was, after all, the basis of an agreement to be entered into, later, by the parties. It was clearly envisaged in the MOU that a final agreement be entered into and the EGM on 3 January 1993 had merely agreed to that situation. As regards the waiver of the High Court's consent, C I accept the submission of the defence that it could not be done because the IA is a charitable purpose company limited by guarantee and that public interest consideration required it to obtain the consent of the High Court as reflected in its memorandum. Even SP1 himself was aware of the need of this consent. Thus, unless and until its M & A, in particular on the requirement of the court's consent was obtained in divesting its property, D the IA even through a resolution by its members could not circumvent this requirement. In *Public Bank Bhd v Metro Construction Sdn Bhd* [1991] 3 MLJ 56 at p 61, the learned judge considered this point and held:

> In my consideration of the first limb of question (i) posed by counsel for Metro, namely, whether the third party charges are ultra vires the company's E memorandum of association, it must be noted that a company's objects as stated in its memorandum cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is ultra vires the company and cannot be validated by assent of a general meeting of the members or by taking judgment against the company by consent or by estoppel. This proposition is neatly stated in the following short passage of the judgment of the Privy Council in *Great North-West Central Railway Co & Ors* F *v Charlebois & Ors* at p 124:
>
>> 'It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done.'
>
> Next it must be borne in mind that in the construction of the object clauses of G a memorandum, the ordinary rules applicable to the construing of documents apply equally well to the construction of the object clauses. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is ultra vires. Thus in *Cotman v Brougham,* Lord Parker said at pp 520–521:
>
>> H 'The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, I and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover, experience

> soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares In another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object.'

As regards SP4 and SP5's perception that the MOU was already a binding agreement, my view is that these two gentlemen alone do not make up the BSC, much less the IA. Now, even though SP4 may be in a position of authority to negotiate on behalf of the defendant, he cannot singularly bind the defendant. In his dual functions as president of the IA and chairman of the BSC he was merely authorised to negotiate for the defendant and not empowered to bind it. Further, as earlier stated, the BSC was merely a sub-committee of the MC created to oversee the building project. As such, I cannot agree with the view that the agreement that was accepted at its meeting on 14 September 1994 was binding on the defendant. The conduct of SP4 and SP5 both before and after the signing of the MOU cannot also be held to be binding on the defendant. Firstly, as individual members, they were not in any position to decide for the defendant. Secondly, it would be naive to say that SP1 was not aware that the parties were still negotiating the terms of a final agreement, even after the MOU was signed. In preamble 3 itself it was contemplated that a final agreement be later signed. In coming to the conclusion that the MOU is not a binding agreement, this court had considered all the surrounding circumstances, including the conduct of the leading players in the negotiations and the contemporary documents showing the state of affairs then existing, although I am aware of the general principle that an agreement cannot be construed in the light of the subsequent conduct of the parties alone (see *Lam Kee Ying SB v Lam Shes Tong & Anor* [1974] 2 MLJ 83). The court is however entitled to look at the surrounding circumstances — and this would include conduct of the parties — and the background, including the ongoing negotiations to determine whether the MOU could be held to be a binding contract (see *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108). In that case the parties had agreed by way of a letter to the sale and purchase of certain lands. Amongst the terms stated were that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed before 18 March 1989. A sale and purchase agreement was subsequently prepared and signed by the respondent. The agreement contained two new conditions to which the appellant did not

A agree and refused thus to execute the agreement. It was held by the then Supreme Court at pp 108–109 that:

> 1 There was no contract at all, because the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. The proviso in the said document was very similar to the phrase or formula of 'subject to contract'. There need not be the very B words of the said formula in order to have the usual effect arising from the use of such formula.
>
> 2 The words 'usual terms and conditions' failed to reveal certainty and were too ambiguous. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create C uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties.
>
> 3 It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption. On the facts of this case, there was cogent evidence to show that negotiations were still D ongoing between the parties, including: (i) the provision of the return of the deposit on the failure of the parties signing the contract by 18 March 1989; (ii) the agreement which was signed by the plaintiff only, containing two more conditions; (iii) there could have been a further amended draft of the ultimate agreement to take account of withdrawal of the compulsory acquisition over part of the land; and (iv) the E correspondence after the date of the said document.
>
> 4 Evidence of surrounding circumstances, background and negotiations between parties is admissible and relevant to show that there was no contract or concluded and binding agreement at all, for ss 91 and 92 of the Evidence Act 1950 merely strike at evidence to contradict, vary, etc, the terms of an established contract, for in that event, such evidence F would be unacceptable. Correspondence that passed after the date of the said document was relevant also, for in finding whether there was any contract at all the court must look at the correspondence as a whole.

This court had also considered that SP1 had spent considerable time and effort in the interim, running to the various authorities to have the building G plans approved and planning permission obtained. This he had done even when the draft agreements were being prepared. He has this court's sympathy but this is not a court of equity which can act on its conscience alone. Going by the evidence it was clear that SP1 had fully trusted that SP4 would see the whole project through and in the end would sign up a JVA (P137) with the plaintiff. Sadly, this was not to be and the emergence of H SD4 onto the scene from 7 July 1994 saw to it that the final agreement would not be concluded. I agree with the defence submission that it was a risk that the plaintiff undertook and he cannot be reimbursed for the expenditure he had incurred. (See *Ayer Hitam Tin Dredging & Regalian Properties v London Dockland Devp Corp* [1995] 1 All ER 1005.) In spite of SP1's endeavour to sign up the final agreement and whatever effort he had I put in, and in spite of the bickering within the fold of the MC, the fact of the matter is that a final agreement was not executed. SP1 had continued to deal with SP4 in the latter's capacity as BSC chairman, even after he had resigned from the MC. SP4 proceeded to deal with SP1 in spite of the MC's disapproval and direct order to discontinue negotiations with SP1. In my view, SP4 was then put in a position that he cannot ignore his previous dealing with SP1 and felt that he had to honour whatever commitments he had given to SP1. But, to reiterate, his personal feelings or commitments cannot be binding on the defendant. The successor MC under the chairmanship of SD1 had a responsibility to the defendant's members and an obligation to scrutinize the project all over again — especially against the background of the abortment letter by the plaintiff, the offer coming from a new party, ie PP, and a new and more beneficial proposal made by Penas. I must therefore disagree with learned counsel for the plaintiff's suggestion that SD1 had wanted to deliberately deprive the plaintiff of the project and had conspired to scuttle the agreement, and had probably wanted to award the project to someone of his own choice. There was no such evidence pointing to such a theory. In fact the contrary was stated by SP3 who testified that the present value of the land had to be scrutinized before the defendant signed the agreement with the plaintiff. As the plaintiff had chosen to call SP3 as its witness, his evidence was binding on the plaintiff even if adverse to its case (more on SP3's evidence later). It is my finding that SD1 had merely acted with the interest of the defendant at heart and could not be condemned for his suspicions in view of the new surrounding background of the building project when he took over the helm of the IA.

It was also submitted for the plaintiff that the choice of the phrase 'A final agreement' in preamble 3 and cl 5 of the MOU presupposed that a first or preliminary agreement had been in existence, and, as such the MOU must be held to be binding. I disagreed. In my view the choice of those words showed that the MOU was merely a preliminary document, entered into by the parties to lay the foundation for further negotiations before entering into a final agreement. This court also agreed with the defence when it was submitted that the submission of applications for layout plans for planning permission and the various consultations and discussions SP1 had on the schematic designs with the members of the BSC and its assigned representatives were all but mere steps taken in the expectation that a final agreement would be concluded and not in performance of an existing contract. The MOU had also contemplated that a final agreement could only be concluded on the advice of the respective lawyers. When SP1 signed the purported final agreement this condition had not yet been complied with on the part of the defendant. In the case *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996] 4 CLJ 94, it was held that the phrase 'upon such terms as shall be determined or advised by our solicitors' created an uncertainty that prevented the formation of a binding contract. In other words, the MOU with the inclusion of the need for lawyers' advice could only be held to be a qualified document and could not be said to be an agreement absolutely binding on the parties, if the aforesaid pre-conditions were not met.

The agreement by both parties was for the building of a clubhouse which entailed the inclusion of the plans as an essential part of the contract. The MOU as can be clearly seen was nothing more than a staple document

A of understanding between the parties, a starting point if I can call it so, for them to negotiate and agree on the intricate details of how the building should be finally built. It contains merely five terms — clauses which laid the foundation for future negotiations. The MOU on its own was clearly too uncertain to be enforced. The agreement was not merely for a simple sale and purchase of a building but to build a new clubhouse and it cannot be B gainsaid that it fell far short of a formal agreement with essential terms required of such an agreement. To use the words of the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754:

> C ... we would like to make an observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, would be properly documented.

Thus, in my view, in the absence of a properly documented final agreement executed by the parties, the MOU alone cannot stand and be held to be a binding contract. It was just an agreement to agree from which either party D may, with liberty, withdraw from the subsequent negotiations.

It is trite law that the court will not make a contract for the parties (see *Abdul Malik bin Abdul Majid v Asnah bte Hamid & Anor and Dagang bin Bachik v Abdul Malik bin Abdul Majid* [1985] 2 MLJ 459). Its duty is merely to interpret the document entered into by disputing parties, in this case, the E MOU, and decide whether such a contract does in fact exist. In a case where the court is to consider and decide a preparatory document such as the MOU to determine its effect, this court will not only, and merely, look at the nature of the document but the true intention of the parties. This court will also have to determine whether the parties had intended to be immediately bound by the MOU or at a later date subject to the fulfilment F of certain conditions, in this instant, the execution of a formal document. The MOU was certainly, in my finding, not an immediately binding document, even though a formal document was to be subsequently executed. As the events unfolded, I found the parties not to be ad idem at the point when the formal agreement was being prepared. Further, as earlier stated, having regard to the lack of details in the MOU, such as the land area G and the building plans and the conditions to be met as was intended by the parties, such as advice of respective legal advisers and consent of the general body, I can only conclude that there was no binding agreement in the words of the MOU alone. In *Ayer Hitam Tin Dredging (M) Bhd* it was held by the then Supreme Court at pp 754–755:

> H 2 However, when an arrangement is made 'subject to a contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged.
>
> I 4 On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which are agreed as a basis for the negotiations of the contract. It was the letter of intent, ie an expression in writing of a party's present intention to enter into a contract at a future date.

As so it was with the MOU in this case although labelled as a memorandum of understanding. As for such a document Visu Sinnadurai J in *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action* [1996] 3 MLJ 385, said by way of obiter at p 387:

> The use of MOU by estate agents ought to be discouraged and they should seek legal advice in drafting then. An option agreement whereby the purchaser pays a small consideration, and that contains detailed terms of the sale and purchase, is more appropriate, as it gives the purchaser reasonable time to consider whether to commit himself to the purchase. And the vendor will be under an obligation not to sell the property to a third party until after the expiration of the option period. Alternatively, parties should be encouraged to enter into a lock-out agreement. With this, the vendor, for valuable consideration, agrees for a specified period of time not to negotiate with anyone except the potential purchaser in relation to the sale. This was given judicial recognition in *Walford & Ors v Miles & Anor* [1992] 1 All ER 453 and *Pitt v PMH Asset Management Ltd* [1993] 4 All ER 961. With conditional contracts, the parties ought to state expressly that in the event of any failure on the part of either party to fulfill their specified obligations, certain specific consequences will follow.

The parties were therefore at liberty to withdraw from their positions under the MOU without any legal consequences or sanctions. I also find that the payment of the RM30,000 deposit by the plaintiff as nothing more than to show good faith to further negotiate on the terms, and as such, not a reason to bind the defendant.

Since the MOU had been found by this court not to be a binding contract which can be specifically enforceable for the reasons given earlier, s 20(1)(c) of the Specific Relief Act 1950 must therefore be invoked to deny the plaintiff its claim for specific performance. That section states:

> The following contracts cannot be specifically enforced:
>
> (c) a contract the terms of which the court cannot find with reasonable certainty.

It was also submitted for the plaintiff that the defendant is estopped from denying the existence of a contract. On this point, I need only adopt and accept the submission forwarded by the defence stating that there was no binding obligation under the MOU that the defendant must enter into an agreement with the plaintiff, whatever the terms. There was also no evidence that the defendant had encouraged the plaintiff to incur any expenditure to its detriment, and as earlier held, these expenditures were incurred in the hope that a binding contract would be executed, and at the plaintiff's own risk.

A string of authorities was cited by both sides as can be seen from the voluminous bundles, and I need not go through all these cases. Suffice to say that what the court needed to deal with was the construction of the MOU and determine whether the parties had intended to be bound under it or, having considered the surrounding circumstances (which I found to be unsupportive of the plaintiff's case), it was not so intended until the

A occurence of some further event. I fully agree with the view of the learned judge in *Abdul Rahim bin Syed Mohd* (cited above) that:

> ... each case must be decided on Its own facts. In each case, it is the duty of the court to determine, not only the nature of the document but also the true intention of the parties at the time the document was executed: whether the parties intended to be bound by any contract immediately, or only on the B fulfilment of certain conditions eg the execution of a formal contract.

Effect of SP3's evidence on plaintiff's case

I need also to say something of SP3's evidence. SP3 is S Sathu Raman, an administrative officer at the Universiti Sains Malaysia, who at the relevant C time was holding the post of the joint secretary of the IA, the defendant. The tenor of his testimony was in favour of the defence, from his explanation of the position of the BSC within the whole organisation of the IA, to the impact of Stella Soo's revocation letter and the stand of the defendant as regards the MOU itself, to the extent that at one point, the plaintiff had applied to treat D him as a hostile witness, which application was turned down since there was no basis for such a ruling. Following that, the questioning during his long examination in chief by the plaintiff's learned counsel, at times, almost became a cross-examination of an opposing witness which required this court's intervention. SP3 stood out as someone obviously in SD1's camp. The plaintiff, it seems to me, had run a great risk of calling him as its witness E (see eg *M Ratnavale v S Lourdenadin and M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 at p 380, per Hashim Yeop A Sani SCJ). That notwithstanding, I found him a truthful and reliable witness, although he was at times partisan. But the plaintiff had called him as its witness and must so be bound by his evidence, even if damning in some parts. This principle was stated succinctly by Gopal Sri Ram JCA for the Court of Appeal in *Lim Guan* F *Eng v PP* [1998] 3 MLJ 14 at p 47 in the following passage:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. The rule is enforced with full G rigour in civil cases. See *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371.
>
> However the law, recognizing that much depends upon the human factor and vagaries of life, refuses to lay down any absolute rule in the matter of evidence evaluation. Witnesses are but human. Testimony may often be coloured by emotion, benign or malice. Not all witnesses speak the whole truth, despite the oath of affirmation administered to them. Not all witnesses H are devoid of bias of one sort or another. Recollection of events is seldom, if ever, perfect. Two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception. There are so many other imponderables. The law would fail to meet the needs of society whose affairs it regulates if it does not take into account the incalculable variables that enter upon the scene when questions of appreciation of evidence arise. I

In my view the above dicta applied in full force in my evaluation of SP3's evidence. There was no suggestion that that witness had not been a truthful one. As such, I accepted his testimony including parts that were in contradiction to the plaintiff's case, especially on his narrative on the circumstances surrounding the post MOU events and the reasons for its non-acceptance as a valid agreement by the defendant and having seen and heard SP3, I had no choice but to give his evidence the necessary weight it deserved (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, where the Court of Appeal had outlined the guidelines on judicial appreciation concerning the evaluation of evidence). I had also adhered to the principle that a party offers his witness as a witness of truth (see *Michael v Soon Teck Finance Co & Anor* [1962] MLJ 53).

Since no legally binding agreement was found to exist in the MOU, the plaintiff's claim for damages for breach of contract must therefore fail.

For the reasons abovestated the plaintiff's claim is dismissed with costs and the deposit of RM30,000 paid to the defendant is to be forthwith returned. The injunction obtained by the plaintiff dated 26 January 1996 is also ordered to be dissolved with an inquiry into damages and similarly, the caveat lodged by the plaintiff be also removed with damages to be assessed.

Claim dismissed.

Reported by Andrew Christopher Simon